SHOW PROCEEDINGS AND ORDERS DATE: [03/09/88]

CASE NBR: [871[illegible]394] [CFX] CASE STATUS: [ ]
SHORT TITLE: [Slyper, Arnold H., et al.]
VERSUS [Meese, Atty. Gen., et al.] DATE DOCKETED: [111887]

PAGE: [01]

DATE	NOTE	PROCEEDINGS & ORDERS
Nov 18 1987		Petition for writ of certiorari filed.
Dec 28 1987		Order extending time to file response to petition until February 11, 1988.
Dec 29 1987		Brief amicus curiae of American Immigration Lawyers Assn. filed.
Feb 1 1988		Brief of respondents Meese, Atty. General, et al. in opposition filed.
Feb 10 1988		DISTRIBUTED. February 26, 1988
Feb 29 1988		REDISTRIBUTED. March 4, 1988
Mar 7 1988		Petition DENIED. Dissenting opinion by Justice White. (Detached opinion.)

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87-894

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

ARNOLD H. SLYPER AND MARCO BAQUERO
PETITIONERS

V.

ATTORNEY GENERAL AND DIRECTOR,
UNITED STATES INFORMATION AGENCY

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in finding that it lacked subject matter jurisdiction to review for abuse of discretion a decision of the United States Information Agency (USIA), pursuant to Sec. 212(e) of the Immigration and Nationality Act, 8 U.S.C. 1182(e), requiring an exchange visitor to return to his home country for two years, despite a finding by the Immigration and Naturalization Service (INS) that such enforced return would impose exceptional hardship on the exchange visitor's American wife.

2. Whether the court of appeals, while acknowledging that such decisions of the USIA could be reviewed on a "colorable claim of constitutional, statutory, or regulatory violation" erroneously found that such a claim had not been presented in the instant case.

3. Whether, in denying the applications for waiver of the home country residence requirement

despite the demonstrated hardship to the American wives of the petitioners, the USIA pursued improper procedures constituting a violation of due process and relied on an erroneous conclusion that the applicable statutes and the legislative intent required it to deal harshly with family hardship waiver applications submitted for foreign doctors.

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The above named petitioners hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, infra) is reported at 827 F. 2d 921. The opinion of the District Court (App. B, infra) is not reported.

JURISDICTION

The judgment of the court of appeals (App. C, infra) was entered on September 4, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Sec. 212(e) of the Immigration and Nationality Act, 8 U.S.C. 1182(e), provides:

(e) No person admitted under section 101(a)(15)(J) of this title or acquiring such status after admission (i) whose participation in the program for which he came to the United States was financed in whole or in part, directly or indirectly, by an

agency of the Government of the United States or by the government of the country of his nationality or his last residence, (ii) who at the time of admission or acquisition of status under section 101(a)(15)(J) of this title was a national or resident of a country which the Secretary of State, pursuant to regulations prescribed by him, had designated as clearly requiring the services of persons engaged in the field of specialized knowledge or skill in which the alien was engaged, or (iii) who came to the United States or acquired such status in order to receive graduate medical education or training, shall be eligible to apply for an immigrant visa, or for permanent residence, or for a nonimmigrant visa under section 101(a)(15)(H) or section 101(a)(15)(L) of this title until it is established that such person has resided and been physically present in the country of his nationality or his last residence for an aggregate of at least two years following departure from the United States: Provided, that upon the favorable recommendation of the Secretary of

State, pursuant to the request of an interested United States Government agency, or of the Commissioner of the Immigration and Naturalization Service after he has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawful resident alien), or that the alien cannot return to the country of his nationality or last residence because he would be subject to persecution on account of race, religion, or political opinion, the Attotney General may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Attorney General to be in the public interest:

And provided further: that, except in the case of an alien described in clause (iii), the Attorney General may, upon the favorable recommendation of the Secretary of State, waive such two-year foreign residence requirement in any case in which the foreign country of the alien's nationality or last residence has furnished the Secretary of State a

statement in writing that it has no objection to such waiver in the case of such alien.

5 U.S.C. 701(a) provides:

This chapter applies, according to the provisions thereof, except to the extent that --

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law, 5 U.S.C. 702 provides, in part:

A person suffering legal wrong or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. 706(2)(A) provides, in part:

That a reviewing court may set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;"

22 CFR 514.32 provides, in part:

Upon receipt of a request for a recommendation of waiver of the home-country physical presence requirement of section 212(e), of the Immigration and Nationality Act, as amended, the Director (of USIA) will review the policy, program, and foreign relations aspects of the case and will transmit a recommendation to the Attorney General for decision.

STATEMENT

1. Exchange visitors, designated by symbol J-1, are one of 14 categories of temporary entrants authorized by Sec. 101(a)(15) of the Immigration and Nationality Act (IN Act), 8 U.S.C. 1101(a)(15). Legislation enacted in 1970 1/ precluded the attainment of lawful permanent residence in the United States by two categories of exchange visitors, 2/

1/ Act of April 7, 1970, P.L. 91-225, 84 Stat. 114.

2/ Those whose visits were government financed or whose skills appeared on a list published by the Secretary of State.

until they had returned to their home country and been physically present there for two years (the home country residence requirement). Foreign doctors, coming to the United States for graduate medical education, were added in 1976 as a third category of exchange visitors subject to the home country requirement. 3/

The 1970 legislation prescribed four grounds upon which a waiver of the home country requirement could be granted: (a) at the request of an interested government agency; (b) upon a showing that this requirement would impose exceptional hardship on the exchange visitor's American citizen or alien resident spouse or child (the exceptional hardship waiver); (c) if the home country stated it had no objection to the exchange visitor's continued residence in the United States (the no objection statement); or (d) if the exchange visitor would be subject to persecution in the home country. The 1976

3/ Act of Oct. 12, 1976, P.L. 94-484, 90 Stat. 2243.

Amendment eliminated the no objection statement as a ground for waiver on behalf of foreign doctors, but made no alteration in the other three grounds for waiver, including the provision for an exceptional hardship waiver.

2. Both petitioners are foreign doctors who entered the United States as exchange visitors, who thereafter married American citizens, whose wives have each given birth to two American citizen children, and who have applied for exceptional hardship waivers of the home country residence requirement.

The somewhat obscure procedural provisions of Sec. 212(e) of the IN Act for the procurement of exceptional hardship waivers were analyzed in Silverman v. Rogers, 437 F. 2d 102 (1st Cir. 1970) to envisage a 3-step process: - (a) a finding by INS of exceptional hardship to the exchange visitor's American family; a favorable recommendation thereafter by the United States Information Agency

(USIA); [4] and grant of the waiver by INS. The Silverman analysis was adopted by the courts below and is not in disoute here.

The background of the waiver applications of the two petitioners is separately described below.

Dr. Arnold H. Slyper (Slyper), a native and citizen of Great Britain, was admitted to the United States as an exchange visitor on July 12, 1979 (J.A. 8).[5] In issuing the J-1 visa to Slyper, the American consul in Toronto, Canada erroneously certified that Slyper was not subject to the home country residence requirement. J.A. 8.

After his admission to the United States, Slyper married Judith Blech (Judith), a native-born American citizen. A year later, Judith gave birth to a daughter who is also a native-born American

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4/ The functions of the Secretary of State under this statute were transferred to the USIA. See Reorganization Plan No. 2 of 1977, House Doc. 95-243 and Act of Aug. 24, 1982, P.L. 97-241, 96 Stat. 273.

5/ J.A. reference are to the Joint Appendix in the court below.

citizen. J.A. 8. Thereafter Slyper filed with INS an application for waiver of the home country residence requirement on the ground that compliance would visit exceptional hardship on Judith, his American-citizen wife. J.A. 9. The alleged hardship consisted of the interruption of Judith's professional career as a research chemist, the serious economic consequences of a move to England, the emotional impact on Judith of a prolonged separation from her family, and the reliance on the erroneous advice from the American consul by Judith and Slyper in planning their marriage. See Slyper v. Attorney General, 576 F. Supp. 559, 560-561 (D.D.C. 1983).

The waiver application was denied by INS on the ground that exceptional hardship had not been established. This determination was challenged by a suit for declaratory judgment and injunction. On December 22, 1983 the district court found that INS had abused its discretion in ruling that exceptional hardship had not been established, and remanded the matter to INS for further pro-

ceedings. Slyper v. Attorney General, supra.

INS then forwarded the waiver application to the district court's opinion to USIA for a recommendation whether a waiver should be granted. Shortly thereafter, USIA recommended to INS that the waiver be denied, stating, J.A. 10.

> "It is noted that INS did not make a finding of hardship but merely forwarded Judge Greene's opinion and order with the I-613 request for a recommendation. It is considered that what hardship may exist does not outweigh the program and policy consideration of the Exchange Visitor Program and the Congressional intent of Public Law 94-484."

INS thereafter denied the waiver application, on the ground that USIA had failed to make a favorable recommendation, and stating that such a favorable recommendation is a statutory prerequisite to the grant of a waiver. J.A. 10.

Slyper's counsel then sought to persuade USIA to reconsider its refusal to recommend, pointing to the Vice consul's erroneous assurance that Slyper would not be subject to the two-year foreign residence requirement, and urging that Slyper consequently "cannot be charged with reneging on an obligation he did not knowlingly undertake." J.A.

11, 20. USIA responded that "we are not disposed to change our original recommendation." Slyper's counsel then wrote to USIA, requesting a statement of the basis for their decision. USIA responded declining to furnish any further particulars. J.A. 11, 22a, 23.

The district court then granted permission to file an amended complaint, joining the USIA as an additional party. Thereafter USIA made a motion to dismiss the amended complaint on the ground that the district court lacked subject matter jurisdiction to review the USIA determination. J.A. 24. The district court granted the motion. J.A. 25.

Marco Baquero is a doctor, native and citizen of Ecuador, and duly licensed to practice medicine in that country. J.A. 27. He entered the United States as a visitor in 1981, and a month later his status was changed to exchange visitor, so that he could engage in a program for advanced medical training. J.A. 27.

During his medical training Baquero met and eventually married Jean Walsh (Jean), an institutional dietician, who is a native-born citizen of the United States. J.A. 27. In 1983 Jean filed with INS, as authorized by Sec. 204(a) of the IN Act, 8 U.S.C. 1104(a), a petition to accord immediate relative immigration status to her husband, Baquero. That petition was approved by INS several months later. J.A. 27.

In 1984 Baquero filed with INS an application for waiver of the two-year foreign residence requirement to which he was subject as an exchange visitor, so that he could continue living with his citizen wife in the United States. The waiver application was accompanied by voluminous documentation showing that compliance by Baquero with the two-year foreign residence requirement would subject Jean to extraordinary medical, emotional, cultural, economic, and professional hardships. J.A. 29, 35 et seq.

INS found that exceptional hardship to Jean had been adequately established, and forwarded the waiver application to the USIA, asking the USIA for its recommendation. J.A. 29, 60. USIA thereafter recommended that the waiver be denied, and stated, J.A. 29, 60:

> "The USIA has determined that the program and policy considerations of the Exchange Visitor Program outweigh the hardship alleged for the American citizen spouse."

USIA never informed Dr. and Mrs. Baquero of their determination and never gave them an opportunity to dispute it.

INS thereafter notified Baquero that - J.A. 29, 61:

> "The United states Information Agency has recommended that the request for a waiver be denied because the program and policy considerations of the Exchange Visitor Program outweigh the hardship claimed for the American citizen spouse. The Service consurs in the recommendation, and the waiver is hereby denied."

Dr. and Mrs. Baquero have never been told what program and policy considerations outweigh the demonstrated hardships to Jean, the American citizen wife.

Baquero then brought suit against the Attorney General and the USIA, contending that the unfavorable recommendation of the USIA and the INS concurrence in that determination were an abuse of discretion and were based on an erroneous belief that Congress intended that they should deal harshly with waiver applications submitted by doctors, based on exceptional hardships to American spouses. J.A. 26. The district court dismissed the complaint sua sponte on the basis of its decision in the Slyper case a day earlier, finding that it lacked subject matter jurisdiction to review determinations by USIA. J.A. 63.

Slyper and Baquero then appealed to the court of appeals for the District of Columbia Circuit. Because of their common legal issues, the appeals were consolidated for briefing and oral argument.

On September 4, 1987 the court of appeals affirmed the dismissal of the complaints, declaring that "Congress intended to vest maximum discre-

tion in the Director (of USIA) to oppose waivers requested by visiting physicians." Without citing any supporting legislative expression, the court asserted that: "This broad delegation of discretionary authority is 'clear and convincing evidence' of congressional intent to restrict judicial review in cases such as that we now face."

The court of appeals acknowledged that USIA waiver decisions could be subject to review on a colorable claim of "constitutional, statutory, or regulatory violation," but that petitioners had made no such claim and had charged merely an abuse of discretion. The court stated that it was ruling merely that the district court lacked subject matter jurisdiction to review the two USIA decisions for abuse of discretion. It acknowledged that there was a division in the circuit courts on this issue, with the Ninth and Second Circuits sharing its view and the Third Circuit opposed.

REASONS FOR GRANTING THE PETITION

This case presents an important question of first impression in this Court. It concerns the amenability of the USIA to judicial review in discharging its adjudicative functions under the immigration laws.

The ruling of the court of appeals that the district court lacked jurisdiction to entertain a challenge to the legality of the USIA's denial of a waiver was an indefensible abdication of the judicial function. In effect, it found that in acting on waiver applications the USIA has an unassailable license to act cruelly, irrationally, unfairly, and arbitrarily, that it does not have to give any reasons for its determinations, and that no court is authorized to question such abuses of its authority.

In arriving at this extraordinary conclusion, the court below has misread that applicable statutes and the decisions of this court. Moreover, it acknow-

ledges that its holding is contrary to the Third Circuit's decision in Chong v. USIA, 821 F. 2d 171 (3rd Cir. 1987). The issue presented in this case is thus one of national importance, involving hardships for many American families and presenting a conflict in circuits. A resolution by this court is urgently required.

1. In ruling that USIA decisions are not subject to judicial review, the court of appeals has misread several decisions of this court. The guiding principle was expounded in Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967), which declared that there is a strong presumption favoring judicial review of agency action, unless there is clear and convincing evidence that Congress intended to foreclose such review. That cardinal principle has been repeated by this court and by the lower courts on many subsequent occasions.

In seeking to avoid the thrust of this maxim, the court of appeals asserted that the grant to USIA of broad discretionary power furnished "clear

and convincing evidence" of a desire to bar judicial review. Not a single iota of specific evidence to support such a Congressional intention is offered in the opinion of the court of appeals, and we are aware of none. In the absence of such evidence, the presumption of reviewability must be applied.

The court of appeals next relied on the familiar dictum in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 403, 410 (1971). In that case, the court found an administrative decision reviewable. It referred to the presumption favoring reviewability, and a dictum described the rare situations where review might be precluded as "a very narrow exception" that might be invoked when "there is no law to be applied."

The finding that "there is no law to apply" in the instant case disregards the actual situation of the exchange visitor legislation as an integral provision of the Immigration and Nationality Act. In its earlier decision in Abourezk v. Reagan, 785 F. 2d 1043 (D.C. Cir. 1986), affirmed by an

equal division of this court on Oct. 19, 1987, the court below confronted a contention that "there is no law to apply" in exercising discretionary authority under Sec. 212(a)(27) of the IN Act, 8 U.S.C. 1182(a)(27). The court ruled that the Immigration and Nationality Act listed 33 grounds of exclusion to guide the Secretary's exercise of discretion.

In the instant case, the court of appeals sought to distinguish Abourezk by asserting that the statute "provided explicit guidelines for its exercise of discretion." But Sec. 212(e) is a segment of the same statute (and indeed of the same section) which provided guidelines in Abourezk, and the policies expressed in that comprehensive statute equally provide guidance here.

Moreover, an adequate and self-sufficient foundation for the exercise of the USIA's discretion is provided by Sec. 212(e) of the IN Act and the implementing regulations. Sec. 212(e) sets forth categories of exchange visitors subject to the home country requirement and the specific grounds for the

waiver of that requirement. 22 CFR 514.32 states that in exercising its waiver function the USIA will "review the policy, program, and foreign relations aspects of the case." We suggest that the statute and the regulation manifestly designate the "law to apply" in the exercise of discretion. The issue in this litigation is not an absence of guiding law but rather the manner in which that law has been administered.6/

2. The hypothesis that discretionary determinations authorized by statute cannot be reviewed unless there are fixed criteria for the exercise of discretion overlooks the nature of discretionary action, and the need for flexibility in assessing particular facts. The immigration laws are replete with grants of discretionary authority in the most expansive terms.

6/ The reliance of the court of appeals on Heckler v. Chaney, 105 S. Ct. 1649, 1655 (1985) is also misplaced. This court's observations in that case dealt with an agency decision not to prosecute and are irrelevant to administrative decisions which adjudicate individual rights and benefits.

A notable example is Sec. 244(a) of the IN Act, 8 U.S.C. 1254(a), which provides that the Attorney General "may, in his discretion, suspend deportation" of aliens who meet prescribed pre-conditions. Similar unrestricted grants of authority appear throughout the IN Act.

Despite the absence of specific statutory guidelines, the exercise of such discretion is frequently reviewed by the courts. See 2 Gordon and Rosenfield, Immigration Law and Procedures, Sections 8.15 and 8.23. An example of such review is INS v. Rios-Pineda, 471 U.S. 444, 105 S. Ct. 2098, 2103 (1985) where this court observed that "unreasoned or arbitrary exercise of discretion" was a proper subject for judicial review, but concluded, after careful review of the record, that there had been no abuse of discretion.

The USIA concededly is performing a discretionary function in considering waiver applications. The court below specifically ruled that the USIA is

immune to any challenge for abuse of that discretion. As we have noted, the court conceded that this ruling is directly opposed to that of the Third Circuit in Chong v. USIA, 821 F. 2d 171 (3rd Cir. 1987). While the court asserted that two other circuits are in accord with its holding, the extent of that concurrence is uncertain. In both of those cases, unfavorable district court decisions had forced the USIA to produce its records revealing the basis for rejecting the waiver applications. After reviewing the records, "in the context of a given complaint," the court in Abdelhamid v. Ilchert, 774 F. 2d 1447, 1450 (9th Cir. 1985) found that "the alleged abuse of discretion consists only of the making of an informed judgment by the agency." In Dina v. Attorney General, 793 F. 2d. 473 (2d Cir. 1986) the panel's opinion did express the view that the USIA waiver decision was not reviewable. However, Judge Oakes, in concurring, found that the USIA decision was subject to review for abuse of discretion. After examining

the record, he concluded that there had not been an abuse of discretion. 793 F. 2d at 477-478.

There is thus a diversity of opinion in the lower courts in addressing an issue of national importance. We submit than an expression by this court is needed for the guidance of the lower courts, as well as the interested agencies and litigants.

The reliance by the court of appeals on the APA to support its hypothesis of unreviewability is incomplete and misguided. 5 U.S.C. 701(a)(2) precludes reviewability "to the extent that .... agency action is committed to agency discretion by law." (emphasis added). The extremely narrow compass of this preclusion is demonstrated by an examination of the APA in totality, which was not attempted by the court below.

A second part of the statutory pattern is 5 U.S.C. 702, which directs that "a person suffering legal wrong because of agency action, or adversely affected by agency action within the meaning of a relevant

statute, is entitled to judicial review thereof." A third part is 5 U.S.C. 706, which authorizes the reviewing court to decide all relevant questions of law, interpret all constitutional and statutory provisions, and, as stated in clause (2)(A), to set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Also relevant is 5 U.S.C. 551, which broadly defines "agency" to mean "each authority of the Government of the United States," with specified exceptions not including the USIA.

Read together as part of an integrated statute, these provisions mean that the USIA, like other government agencies, is subject to judicial review of its waiver denials at the behest of an aggrieved or adversely affected party, and that while the court cannot review the decision "to the extent that" it involves the exercise of discretion (in other words, the court cannot substitute its discretion for that of the USIA), it can determine

whether there has been an error of law or an abuse of discretion.

3. In finding itself powerless to review the waiver rejections by the USIA, the court thus misconceived its statutory function. Indeed, the court of appeals ignored or rejected the following specific grounds for judicial intervention.

a. Statutory misconstruction. The court of appeals incorrectly stated that neither petitioner had made any claim of statutory violation. Actually, the complaints in both cases alleged that the USIA has misread the applicable legislation and the legislative intent in denying the waivers, despite the exceptionaly hardships to the American families. (J.A. 12, 30). This issue was extensively argued in the briefs[7/] and it was the sole issue discussed by both counsel in the oral argument before the court of appeals. Indeed, our contention that the

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7/ Appellee's brief, p. 28-34; Appellant's reply brief, p. 17-20.

USIA has erred in its interpretation of the statutory language and purpose has been a major aspect of our challenge from the outset.

In these cases and in other litigations, and in public statements by USIA officials, USIA has expressed the view that that statutory amendments relating to foreign medical graduates enacted by the Health Professions Educational Assistance Act of October 12, 1976, P.L. 94-484, 90 Stat. 2243 (the (the Doctors Act) evidence a Congressional desire for severity in considering waiver applications by foreign doctors based on exceptional hardship to an American spouse or child. It is true that the Doctors Law imposed two additional restrictions on exchange visits by foreign doctors: - (1) it added them as a third class of exchange visitors subject to the home country residence requirement; (2) it precluded waivers for such doctors based on so-called "no objection" statements by their home countries But the Doctors Law did not amend the statutory provision authorizing waivers because of exceptional

hardship to American families, which has been unchanged in the statute since its original adoption in 1961. And there is no suggestion in the language of the statute or its legislative history [8] of a Congressional wish to modify the concern for the protection of amily relationships which is a dominant concern of our jurisprudence. [9] In fact, the legislative desire to protect family unity is emphasized in many provisions of the immigration laws. [10]

8/ The USIA has stated in the court below (see USIA brief, p. 33-34) and on other occasions that its rigid approach to waiver applications by foreign doctors stems from a colloquy between Congressman Mazzoli and the USIA Associate General Counsel at a 1981 legislative hearing on a proposal to extend authorized periods of stay for foreign medical residencies to 7 years. Congressman Mazzoli obviously had second thoughts, since the extension was enacted without change, and Congressman's Mazzoli's off-hand observations were not repeated in the legislative reports or in the floor debates. This sequence of events hardly supports the view of legislative purpose adopted by the USIA.

9/ See Zablocki v. Redhail, 434 U.S. 374, 384, (1978) (right to marry is a fundamental constitutional right and impairments of marital status are subject to strict scrutiny).

10/ E.g., IN Act, Sec. 201, 8 U.S.C. 1151 (quota exemption); Sec. 212(g), (h), (i), 8 U.S.C. 1182(g), (h), (i) (waivers).

The USIA thus has misread the statute and the legislative purpose in concluding that Congress intended that waiver applications by foreign doctors based on family relationships should be dealt with more severely than similar applications by other exchange visitors. Their pursuit of that mistaken policy has inflicted, and continues to inflict, incalculable harm on the careers and family relationships of Slyper, Baquero, and large numbers of other foreign doctors and their American families.

b. Abuse of discretion. The court of appeals concluded that it lacked jurisdiction to determine whether the USIA had abused its discretionary authority. We have previously shown that this abdication of judicial responsibility relied on flawed premises. It will be helpful, we believe, to describe some of the arbitrary, capricious, and abusive procedures challenged in these cases.

The correct approach to the judicial function in reviewing discretionary determinations was des-

cribed by this court in Bowen v. American Hospital Assn., 106 S. Ct. 2101, 2113 (1986):

> "Our recognition of Congress' needs to vest administrative agencies with ample power to assist in the difficult task of governing a vast and complex industrial Nation carries with it the correlative responsibility of the agency to explain the rationale and factual basis for its decision, even though we show respect for the agency's judgment in both."

The USIA has failed to comply with its responsibility "to explain the rationale and facual basis for its decision." The waiver applications were referred to USIA after the INS had decided, pursuant to the statutory design, that imposition of the home country residence requirement would impose exceptional hardship to the American spouses of the applicants. USIA returned the applications to the INS with an adverse recommendation, stating (in Dr. Baquero's case), J.A. 29, 60:

> The USIA has determined that the program and policy considerations of the Exchange Visitor Program outweigh the hardship alleged for the American citizen spouse.

The laconic observation, invariably reiterated by USIA whenever it rejects a waiver application, 11/ merely repeats the language of its regulations, 22 CFR 514.32. The USIA has refused to specify what "program and policy consuderations" it has relied on in these and in all cases, and it thus has not revealed "the rationale and factual basis of its decision." This generalized, boilerplate statement is designed to hide the actual basis for denial, rather than revealing it. And the USIA has refused to be more forthcoming. See J.A. 22a, 23.

Without a reasoned decision, the court and the affected applicants are left in the dark, and the court cannot determine whether an abuse of discretion has occurred. Indeed, representatives of USIA have publicly stated that their persistent refusal to reveal specifics is designed to defeat judicial

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11/ The rejection in Dr. Slyper's case also referred to "the Congressional intent of Public Law 94-484" (the Doctors Law). J.A. 10. This reference confirms the erroneous reliance of USIA on supposed Congressional intent, previously discussed in this petition.

inquiry. 12/

Without a reasoned explanation, we are at a loss to understand how the program and pilicy of USIA would be affected if Dr. Slyper and Dr. Baquero were permitted to remain in the United States with their families. The alleged affect on program and policy is particularly puzzling in relation to Dr. Slyper, who was officially misinformed, before entering the United States and before he married a U.S. citizen, that he was not subject to the home country residence requirement.

The abusive policies of the USIA additionally were demonstrated in its dealings with Dr. Slyper and Dr. Baquero. They were not notified that their applications had been referred to the USIA, were

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12/ Statements of USIA Assistant General Counsel Richard Fruchterman and USIA Attorney Mary Lynn, reported in American Immigration Lawyers Assn. (AILA) July-August, 1987 newsletter, p. 1075, 1076; and statement of Mr. Fruchterman in AILA Washington, D.C. Chapter June 1987 newsletter, p. 1.

not informed of any adverse evidence or given an opportunity to rebut it, and were not notified by the USIA of its decision. Indeed, the USIA contended in the court of appeals that waiver applicants have no rights. Br. 16-19.

We suggest that there is no legislative, judicial or public policy which precluded a challenge to such abusive policies and procedures.

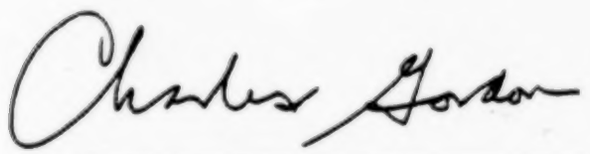
c. Constitutional challenge. The court of appeals agreed that constitutional violations could be addressed, but mistakenly declared that: "neither appellant, however, has made any such claim." It is true that the complaints primarily contended that the procedural violations were an abuse of discretion, but they also portrayed a violation of due process. Moreover, ancillary reliance on a due process claim was mentioned in our opening brief p. 18) and was more extensively discussed in our reply brief, under the caption: "These cases adequately charge procedural inadequacies entailing a denial of due process." (p. 14-16).

Slyper and Baquero, and their American families residing in the United States, are sheltered by the Fifth Amendment's guarantee of due process. They charged in the court below and they charge now that the procedural violations depicted in the record were a denial of due process. The court's statement that such a claim was not presented was clearly erroneous.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Charles Gordon
Attorney for petitioners

December 1987

CERTIFICATE OF SERVICE

I hereby certify that on December 1, 1987 I served the attached petition for certiorari by mailing 3 copies, first class postage prepaid, addressed as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

Charles Gordon

Charles Gordon

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5331

ARNOLD H. SLYPER, APPELLANT

v.

ATTORNEY GENERAL

No. 86-5335

MARCO BAQUERO, APPELLANT

v.

ATTORNEY GENERAL, et al.

Appeals from the United States District Court
for the District of Columbia
(D. C. Civil Action Nos. 82-3048 & 86-0692)

Argued February 2, 1987

Decided September 4, 1987

Charles Gordon for appellants.

Joseph A. Blundon, Assistant General Counsel, U.S. Information Agency, of the bar of the District of Colum-

bia Court of Appeals, *pro hac vice*, by special leave of court, with whom *Richard K. Willard*, Assistant Attorney General, and *Donald A. Couvillon*, Attorney, U.S. Department of Justice, and *C. Normand Poirier*, Acting General Counsel, U.S. Information Agency, were on the brief, for appellees. *Joseph E. diGenova*, United States Attorney, and *Royce C. Lamberth*, *R. Craig Lawrence*, and *Diane M. Sullivan*, Assistant United States Attorneys, also entered appearances for appellees.

Before RUTH B. GINSBURG, BUCKLEY, and DOUGLAS H. GINSBURG, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* BUCKLEY.

BUCKLEY, *Circuit Judge*: The question before us in these consolidated cases is a narrow one; namely, whether a district court has jurisdiction to review a decision by the United States Information Agency not to recommend that two foreign doctors receiving training in the United States be granted a waiver of a statutory requirement that they return to their countries of origin for two years before being allowed to apply for foreign residency status in the United States. We affirm the district court's conclusion that it has no jurisdiction to hear the cases because there is no law for the court to apply.

I. BACKGROUND

These cases involve foreign medical graduate students who are in the United States under the auspices of the Exchange Visitor Program authorized by the United States Information Agency ("USIA"). 22 U.S.C. § 2452 (1982). Each student has married a United States citizen and seeks permanent resident status in this country through the waiver of a statutory requirement that he first return to his country of origin. Appellants claim that such a return will impose extraordinary hardship on their wives. These cases are governed by 8 U.S.C. § 1182(e) (1982), which requires, as one of the condi-

tions for the grant of a waiver, that it be favorably recommended by the Director of the USIA.

In the first case, the USIA denied appellant Slyper's request for a favorable recommendation because "[i]t is considered that what hardship may exist does not outweigh the program and policy considerations of the Exchange Visitor Program or the Congressional intent of Public Law 94-484." Denial of Waiver Request (May 21, 1984) (Joint Appendix ("J.A.") at 16). This denial was subsequently reaffirmed without further elaboration in two letters from USIA's General Counsel to Slyper's attorney. Letters from Richard Fruchterman to Charles Gordon (Sept. 4 and 10, 1984) (J.A. at 22 and 23).

Slyper brought suit alleging that the USIA's refusal to make a favorable recommendation was "arbitrary, unreasonable, and an abuse of discretion." Amended Complaint for Slyper Para. 22 (J.A. at 12). The district court dismissed the action because the statute vested the USIA with so "broad and vague" a mandate that it had "no law to apply." *Slyper v. Attorney General*, No. 82-3048, Memorandum Order at 4-5 (D.D.C. Mar. 26, 1986) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971)).

The district court dismissed appellant Baquero's complaint for the same reason. "The Court can find no significant factual difference in this case which might distinguish it from *Slyper* or otherwise provide this Court with jurisdiction in spite of the *Overton Park* doctrine." *Baquero v. Attorney General*, No. 86-0692, Memorandum Order at 3 (D.D.C. Mar. 27, 1986).

II. Discussion

A. *The Statute and the Regulation*

The Immigration and Nationality Act, as amended, provides in pertinent part:

> No person . . . [who] came to the United States . . . in order to receive graduate medical education or training, shall be eligible to apply for an immigrant visa, or for permanent residence, or for a nonimmigrant visa . . . until it is established that such person has resided and been physically present in the country of his nationality or his last residence for an aggregate of at least two years following departure from the United States: *Provided*, That
>
> [1] upon the favorable recommendation of the Director of the United States Information Agency,
>
> [2] pursuant to the request of . . . the Commissioner of Immigration and Naturalization after he has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien), . . .
>
> [3] the Attorney General may waive the requirement of such two-year foreign residence abroad . . . .

8 U.S.C. § 1182(e) (1982).

Our task is to decide whether the district court had subject matter jurisdiction to review the USIA Director's failure to make a favorable recommendation. The Immigration and Naturalization Commissioner's determination of exceptional hardship is not at issue, nor is the Attorney General's discretion to waive the repatriation requirement.

The USIA regulations repeat practically verbatim the waiver procedure in the statute, *see* 22 C.F.R. § 514.31 (1986), and provide the most general type of guidance for USIA action on receipt of a waiver request:

> Upon receipt of a request for a recommendation of waiver of the two-year home country physical presence requirement . . ., the Director will review the policy, program, and foreign relations aspects

of the case and will transmit a recommendation to the Attorney General for decision.

22 C.F.R. § 514.32 (1986) (current version at 22 C.F.R. § 514.32 (1987)).

B. *No Law to Apply*

Citing *Overton Park*, 401 U.S. at 410, the district court concluded that the Director's statutory discretion was so broad that there is "no law to apply" and hence review is precluded by the Administrative Procedure Act ("APA"), 5 U.S.C. § 701(a)(2). *Slyper*, Memorandum Order at 4. The APA precludes a finding of reviewability based on its general reviewability provisions when "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2) (1982).

It is clear from the face of the statute that Congress intended to vest maximum discretion in the Director to oppose waivers requested by visiting physicians. The statute contains no standard or criterion upon which the Director is to base a decision to make or withhold a favorable recommendation. This broad delegation of discretionary authority is "clear and convincing evidence" of congressional intent to restrict judicial review in cases such as those we now face. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967) ("[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review.").

This is not to say, nor does appellee contend, that the decisions of the USIA are never subject to review. The agency acknowledges that it is subject to review "[i]f a colorable claim were made of constitutional, statutory, or regulatory violation, or of fraud or lack of jurisdiction on the part of USIA." Brief for Appellee at 15. Neither appellant, however, has made any such claim. Appellants merely assert that the USIA Director abused his discretion. Therefore, our holding that the

district court lacked subject matter jurisdiction is limited to the issue of its jurisdiction to review the two USIA decisions for abuse of discretion.

This position is consistent with our recent decision in *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir.), *cert. granted*, 107 S. Ct. 666 (1986). *Abourezk* involved the denial of visas to certain foreigners who had been invited by U.S. citizens "to engage in open discourse with them within the United States." *Id.* at 1051. The State Department denied the visas under authority of the Immigration and Nationality Act of 1952 on the grounds that the applicants were "seek[ing] to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States." 8 U.S.C. § 1182(a)(27) (1982). We held that the APA provided the plaintiffs "a right of review extending to the statutory as well as the constitutional propriety of the State Department's application of section 1182(a)(27) to exclude the aliens invited by plaintiffs to the United States as speakers and meeting participants." *Id.*

What distinguishes *Abourezk* from this case is that the statute invoked by the State Department provided explicit guidelines for its exercise of discretion: "the statute lists thirty-three distinctly delineated categories that conspicuously provide standards to guide the Executive in its exercise of the exclusion power." *Abourezk*, 785 F.2d at 1051, *citing* 8 U.S.C. § 1182(a) (1982). By way of contrast, in the case before us the governing statute is devoid of guidance. Insofar as the Director is subject to any direction, it is to be found in the USIA regulation requiring that he review waiver applications in light of unspecified "policy, program, and foreign relations aspects of the case." 22 C.F.R. § 514.32 (1986). In short, we are presented with a classic case of a statute that "is drawn so that the court would have no meaning-

ful standard against which to judge the agency's exercise of discretion," *Heckler v. Chaney*, 105 S. Ct. 1649, 1655 (1985). As the regulation is equally devoid of meaningful direction, the court has no standard against which to assess the Director's exercise of discretion. *Accord Dina v. Attorney General*, 793 F.2d 473, 476 (2d Cir. 1986); *Abdelhamid v. Ilchert*, 774 F.2d 1447, 1449-50 (9th Cir. 1985). *Contra Chee-Chung Chong v. United States Information Agency*, 821 F.2d 171 (3d Cir. 1987). Accordingly, we hold that the district court correctly invoked the narrow exception provided in the APA for "agency action . . . committed to agency discretion by law."

III. Conclusion

The decisions sought to be overturned were committed by statute to the discretion of the USIA Director. As there is no law to apply in either case, the decisions of the district court to dismiss for lack of subject matter jurisdiction are

Affirmed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ARNOLD H. SLYPER, PLAINTIFF, V. ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANT.	CIVIL ACTION NO. 82-3048

MEMORANDUM ORDER

This case involves the issue of the reviewability of a decision of the United States Information Service (USIA) not to recommend plaintiff, an alien, for permanent resident status pursuant to 8 U.S.C. Sec. 1182(e). The action has previously been before the Court on a related issue, and the basic facts are outlined in an Opinion which the Court issued at that time. Slyper v. Attorney General, 576 F. Supp. 559 (D.D.C. 1983).

Briefly stated, plaintiff entered the United States as a nonimmigrant exchange visitor to receive a graduate medical education. Normally, individuals in plaintiff's category may not apply for permanent residency status unless they first return to their native land and remain there for a period of two years. 1/ There is, however, provision in the law for an exception to that rule which allows a waiver of the two-year foreign residency requirement, and this case involves the question whether this plaintiff is entitled to the benefit of that exception. In order to fall within the exception, an alien must overcome three procedural hurdles: (1) the Immigration and Naturalization Service must make a determination that the alien's departure from this country would impose exceptional hardship upon his spouse or child; (2) the USIA, considering the INS determination, must make a favorable recommendation to the Attorney General; and (3) the Attorney General

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1/ 8 U.S.C. Sec. 1182(e).

must make his decision following that favorable recommendation. 2/

The earlier phase of this litigation revolved around the question whether the plaintiff had demonstrated exceptional hardship such as to require INS to forward the petition to USIA for its review. INS initially determined that no exceptional hardship was present. This court reversed and remanded the matter to the agency, finding an abuse of discretion, and directing the entry of a finding of exceptional hardship. Unfortunately, the INS, upon receipt of the Court's determination and order, failed to act in an appropriate manner. Instead of making and forwarding to the USIA a form recording its finding of exceptional hardship, it instead forwarded this Court's opinion and Order. USIA thereupon seized upon this fact to deny plaintiff's request, at least in part on the basis that the INS had not itself made

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2/ Id.

the requisite exceptional hardship finding (as USIA understood the statute to require). Ultimately, after further Court intervention, the problem was resolved: plaintiff amended his complaint to include USIA as a defendant, and the INS, after some delay, forwarded a new form to USIA in which it (rather than only the Court) made the requisite exceptional hardship finding. Upon receiving the new form, USIA again denied plaintiff's waiver request.

The issue now before the Court revolves around this failure of USIA to make a favorable recommendation on plaintiff's behalf to the Attorney General, a failure which plaintiff characterizes as arbitrary, capricious, and an abuse of discretion. 8 U.S.C. Sec. 1182(e) provides that "upon the favorable recommendation of the Director of the United States Information Agency," the Attorney General may waive the requirement of two-year foreign residence. The statute contains no standards or criteria upon which the Director of the USIA is to base his recommenda-

tion or his failure to make a recommendation.[3/]

If there is to be any basis for federal court jurisdiction with respect to the USIA's failure to act, it can rest realistically only on the Administrative Procedure Act, 5 U.S.C. Sec. 701(a)(2). However, the APA does not confer jurisdiction to review alleged administrative abuses of discretion when the governing statute is drawn in such broad terms that "there is no law to apply." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971); Local 1219, AFGE v. Donovan, 683, F.2d 511, 515 (D.C. Cir. 1982); Natural Resources Defense Council v. SEC, 606 F.2d 1031, 1043 (D.C. Cir. 1979).

3/ The legislative history does not supply such standards nor does it indicate that the statute was to be construed to provide for leniency in favor of individuals in plaintiff's category. On the contrary, foreign physicians are the only professional group singled out by Congress as having to promise that they would return home for at least a two-year period. Public Law 97-116, 95 Stat. 1611 (1981; 8 U.S.C. Sec. 1182(j)). Newton v. INS, 736 F.2d 336, 341, (6th Cir. 1984). In addition, other legislative provisions expressly indicate that physicians are not to be given preference in immigration matters. See generally, Public Law 94-484, 90 Stat. 2243 (1976).

The statutute here under consideration vests the widest possible discretion in the USIA with respect to recommendation regarding physician nonimmigrants. That agency is directed to take into account only the "policy, program, and foreign relations aspects of the case . . ." Not only are these matters with respect to which a court would have difficulty in any event to substitute its judgment for that of the Executive Branch agencies entrusted by law with the power to decide, [4/] but the mandate is so broad and vague that there is "no law to apply."

Although the administrative agencies which have had involvement in this case have hardly exhibited an abundance of good faith (see supra), the Court may not on that account exercise jurisdiction where by law no such jurisdiction exists. In short, the

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4/ 22 C.F.R. Sec. 514.32 (1984). Operation of the statute in the foreign relations sphere is buttressed by the fact that initially the functions at issue were exercised by the Secretary of State. See also United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952).

Court is forced to dismiss the action insofar as it seeks relief against the USIA and its officials. Moreover, since a fsvorable recommendation by USIA is a prerequisite for further activity by the Attorney General and for the ultimate relief sought by Plaintiff, the action must and will be dismissed for lack of jurisdiction. 5/

For the reasons stated, it is this 26th day of March, 1986 ORDERED that this action be and it is hereby dismissed.

HAROLD H. GREENE

UNITED STATES DISTRICT JUDGE

5/ See Abdelhamid v. Tichert, No. 84-2313, slip op. at 6-8 (9th Cir. Oct. 28, 1985) (no subject matter jurisdiction for district court to review USIA failure to make favorable waiver recommendation under 8 U.S.C. Sec. 1182(e)).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
UNITED STATES COURTHOUSE
333 CONSTITUTION AVENUE, N.W.
WASHINGTON, D.C. 20001-2866

GEORGE A. FISHER
CLERK

GENERAL INFORMATION
(202) 535-3300

September 4, 1987

RE: 86-5331 - ARNOLD H. SLYPER V. ATTORNEY GENERAL
86-5335 - MARCO BAQUERO V. ATTORNEY GENERAL, ET AL

Dear Counsel:

Enclosed herewith are three (3) copies of the opinion in the above entitled case.

Please note that the judgment has been entered on the same date as the opinion and is for mandate purposes only.

Sincerely,

Denise C. Thomas
Opinions Clerk

Enclosures

DISTRIBUTION:

No. 87-894

In the Supreme Court of the United States

OCTOBER TERM, 1987

ARNOLD H. SLYPER AND MARCO BAQUERO, PETITIONERS

v.

ATTORNEY GENERAL AND DIRECTOR,
UNITED STATES INFORMATION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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18 pp

QUESTIONS PRESENTED

1. Whether the decision of the United States Information Agency (USIA) to recommend against waiver of the two-year foreign residence requirement – which, under 8 U.S.C. (Supp. IV) 1182(e), foreign doctors in this country for graduate medical training must satisfy before applying for lawful permanent resident status – is subject to judicial review.

2. Whether Congress intended that requests by foreign doctors for waiver of the two-year foreign residence requirement be granted sparingly.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 36-42) is reported at 827 F.2d 821. The decisions of the district courts in *Slyper* v. *Attorney General* (Pet. App. 43-49) and *Baquero* v. *Attorney General* (J.A. 63-65)[1] are unreported. A related district court decision in *Slyper* v. *Attorney General* is reported at 576 F.Supp. 559.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 1987. The petition for a writ of certiorari was filed on November 18, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] "J.A." refers to the joint appendix filed in the court of appeals.

STATEMENT

A. *Statutory and Regulatory Background*

Section 212(e) of the Immigration and Nationality Act, 8 U.S.C. (Supp. IV) 1182(e), provides that an alien exchange visitor who has come to the United States to receive graduate medical education or training is ineligible to apply for an immigrant visa or for lawful permanent resident status unless (1) he "has resided and been physically present in the country of his nationality or his last residence for an aggregate of at least two years following departure from the United States" or (2) he obtains a waiver of the two-year foreign residence requirement from the Attorney General. 8 U.S.C. (Supp. IV) 1182(e). One type of waiver that may be obtained is a "hardship" waiver.[2] Before the Attorney General may grant such a waiver, three requirements must be met. First, the Immigration and Naturalization Service (INS) must find that the alien's compliance with the two-year foreign residence requirement "would impose exceptional hardship upon [his] spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien)" (*ibid.*). Second, the Director of the United States Information Agency (USIA) must make a "favorable recommendation" concerning the waiver (*ibid.*). Finally, the Attorney General must find that the admission of the alien into the United States is "in the public interest" (*ibid.*).

The present case centers around the USIA's role in the waiver process. Although Section 1182(e) requires the USIA's favorable recommendation as a prerequisite to a

[2] Waivers may also be granted if an interested federal agency requests one or if "the alien cannot return to the country of his nationality or last residence because he would be subject to persecution on account of race, religion, or political opinion" (8 U.S.C. (Supp. IV) 1182(e)). Petitioners made no attempt to seek a waiver on these alternative bases.

waiver, it does not identify any criteria to be applied by the USIA in making its recommendation. The USIA's regulations reiterate, essentially verbatim, the waiver procedure outlined in Section 1182(e) (see 22 C.F.R. 514.31). In addition, they provide that when the USIA receives a request for a recommendation concerning a waiver of the two-year foreign residence requirement, the Director "will review the program, policy and foreign relations aspects of the case" and will transmit a recommendation to the Attorney General for decision (22 C.F.R. 514.32(a) and (b)). The regulations contain no further criteria to be applied by the USIA in deciding whether to recommend a waiver.

B. *The Present Controversy*

1. This case involves two foreign medical graduate students who have been in this country under the Exchange Visitor Program (see 22 U.S.C. (& Supp. IV) 2452) and who now seek to obtain lawful permanent resident status. Petitioner Arnold Slyper, a citizen of the United Kingdom, entered the United States in July 1979 to pursue a program of graduate medical training. In May 1980, he married an American citizen. Pet. App. 37-38; J.A. 8, 18. Seven months later, Slyper filed applications with the INS for permanent resident status and for a waiver of the two-year foreign residence requirement. The INS determined that no exceptional hardship to Slyper's wife would result if he were required to return to the United Kingdom for two years. It therefore denied Slyper's request for a waiver. Pet. App. 45; J.A. 18.

Slyper then filed suit in the U.S. District Court for the District of Columbia challenging the INS determination. The court held that Slyper had established exceptional hardship to his wife. Accordingly, it remanded the case to the INS for further proceedings. Pet. App. 45; J.A. 18;

Slyper v. *Attorney General*, 576 F. Supp. 559 (D.D.C. 1983). The INS thereafter forwarded Slyper's waiver application and a copy of the district court's opinion to the USIA with a request for a recommendation as to whether a waiver should be granted. In May 1984, the USIA returned the request form to the INS with an unfavorable recommendation. After noting that the INS had not itself made a hardship finding, the USIA stated (J.A. 16):

> It is considered that what hardship may exist does not outweigh the program and policy considerations of the Exchange Visitor Program or the Congressional intent of Public Law 94-484.

In June 1984, the INS again denied petitioner Slyper's request for a waiver, this time because of the USIA's unfavorable recommendation (J.A. 19). The USIA later declined Slyper's request that it reconsider its unfavorable recommendation (J.A 22).

In November 1984, Slyper obtained permission from the district court to file an amended complaint joining the USIA as a defendant in his case (J.A. 3). The USIA moved to dismiss the complaint, arguing that the court lacked subject-matter jurisdiction to review the USIA's unfavorable recommendation because such a decision is committed to agency discretion by law under 5 U.S.C. 701(a)(2). The district court granted the motion and dismissed the case on March 26, 1986 (Pet. App. 43-49). The court noted that 8 U.S.C. 1182(e) "contains no standards or criteria upon which the Director of the USIA is to base his recommendation or his failure to make a recommendation" (Pet. App. 46-47 (footnote omitted)). Rather, that provision "vests the widest possible discretion in the USIA with respect to recommendation regarding physician nonimmigrants" (*id.* at 48). The court indicated that "[t]he legislative history does not supply such standards

nor does it indicate that the statute was to be construed to provide for leniency in favor of individuals in [Slyper's] category" (*id.* at 47 n.3). The court also pointed out that "foreign physicians are the only professional group singled out by Congress as having to promise that they would return home for at least a two-year period" (*ibid.* (citations omitted)).

2. Petitioner Marco Baquero is a citizen of Ecuador who entered the United States in July 1980 as a temporary visitor. A year later, he was accepted into the Exchange Visitor Program for graduate medical training. In 1983, during his medical training, he married an American citizen. J.A. 27. In November 1984, Baquero applied to the INS for a waiver of the two-year foreign residence requirement based on alleged exceptional hardship to his wife (J.A. 29). The INS agreed that exceptional hardship would result from Baquero's compliance with the two-year requirement, and it therefore forwarded the case to the USIA for a recommendation on the waiver application (J.A. 64). The USIA subsequently returned the form to the INS, stating that it was making an unfavorable recommendation because (J.A. 60):

> The USIA has determined that the program and policy considerations of the Exchange-Visitor Program outweigh the hardship alleged for the American citizen spouse.

In August 1985, the INS denied the waiver application on the basis of the USIA's recommendation (J.A. 61).

Baquero subsequently filed suit in the U.S. District Court for the District of Columbia. On March 27, 1986, the district court dismissed the complaint sua sponte, holding that Baquero's claim was essentially the same as Slyper's, which the court had dismissed the previous day (J.A. 63-65).

3. Both Slyper and Baquero filed appeals. The court of appeals consolidated the two appeals and affirmed in both cases (Pet. App. 36-42). The court noted (*id.* at 40) that "[i]t is clear from the face of the statute [8 U.S.C. 1182(e)] that Congress intended to vest maximum discretion in the Director to oppose waivers requested by visiting physicians." The court stated that "[t]he statute contains no standard or criterion upon which the Director is to base a decision to make or withhold a favorable recommendation" (Pet. App. 40). Likewise, the court noted, the applicable regulation is "equally devoid of meaningful direction" (*id.* at 42). Accordingly, the court concluded that the "broad delegation of discretionary authority" constituted " 'clear and convincing evidence' of congressional intent" sufficient to overcome the usual presumption in favor of judicial review (*id.* at 40, citing *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 (1967)).

ARGUMENT

1. Petitioners contend (Pet. 17-26, 29-33) that the court of appeals erred in holding that the district court lacked subject-matter jurisdiction to review petitioners' claim that the USIA abused its discretion in recommending against a waiver of the two-year foreign residence requirement.[3] According to petitioners (Pet. 21-22), review is appropriate, even in the absence of specific statutory guidelines, because the USIA "is performing a discretionary function in considering waiver applications" (*ibid.*). These contentions lack merit and do not warrant further review.

[3] A similar argument is made in an amicus brief filed by the American Immigration Lawyers Association (AILA Br. 4-19).

Under Section 702 of the Administrative Procedure Act (APA), 5 U.S.C. (Supp. IV) 702, a person "adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." Section 701(a) of the APA, however, imposes two limitations on judicial review—*i.e.*, when the statute "preclude[s] judicial review" (5 U.S.C. 701(a)(1)) and when "agency action is committed to agency discretion by law" (5 U.S.C. 701(a)(2)). See generally *NLRB* v. *United Food & Commercial Workers Union*, No. 86-594 (Dec. 14, 1987), slip op. 17; *Heckler* v. *Chaney*, 470 U.S. 821, 828, 830 (1985); *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410 (1971). The exception to judicial review for action committed to agency discretion by law, which was the one relied upon by the courts below (Pet. App. 40-42, 47), applies "if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Chaney*, 470 U.S. at 830; see also *Citizens to Preserve Overton Park*, 401 U.S. at 410 (citation omitted) (noting that 5 U.S.C. 701(a)(2) applies "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply' ").

As the court of appeals noted, the provision at issue here—8 U.S.C. (Supp. IV) 1182(e)—presents a "classic case of a statute that 'is drawn so that the court would have no meaningful standard against which to judge the agency's exercise of discretion' " (Pet. App. 41-42 (quoting *Chaney*, 470 U.S. at 830)). Section 1182(e) provides that the Attorney General may waive the two-year foreign residence requirement only "upon the favorable recommendation of the United States Information Agency." There is no specification of the criteria to be applied by the

USIA in making its recommendation. Similarly, the USIA's regulations contain no criteria that could form the basis for judicial review. Rather, they merely provide that the Director of the USIA shall review waiver applications in light of unspecified "program, policy and foreign relations aspects of the case" (22 C.F.R. 514.32(a)).[4]

Numerous courts have held that the USIA's recommendation on whether the two-year foreign residence requirement should be waived is not subject to judicial review for abuse of discretion. See, *e.g.*, *Dina* v. *Attorney General*, 793 F.2d 473, 476-477 (2d Cir. 1986) (noting that 8 U.S.C. 1182(e) is "entirely bereft of any guiding principles by which the USIA's action may subsequently be judged"); *Abdelhamid* v. *Ilchert*, 774 F.2d 1447, 1449-1450 (9th Cir. 1985) (holding that 8 U.S.C. 1182(e) places no limits on the USIA's discretion and that the applicable regulation, 22 C.F.R. 514.32, likewise "raises no legal issues for review"); see also *Nwankpa* v. *Kissinger*, 376 F. Supp. 122 (M.D. Ala. 1974), aff'd mem., 506 F.2d 1054 (5th Cir. 1975); see generally *Chong* v. *Director, USIA*, 821 F.2d

[4] AILA erroneously claims (AILA Br. 13) that the court of appeals applied the presumption of *un*reviewability applicable to decisions not to take enforcement action (see *Heckler* v. *Chaney, supra*). In fact, the court of appeals applied a presumption *in favor* of judicial review but held that the presumption had been overcome here (see Pet. App. 40). See generally *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 349 (1984) (noting that presumption in favor of judicial review may be overcome by statutory language or legislative history).

Similarly, petitioners err in contending (Pet. 19-21) that the applicable criteria for judicial review can be found in 8 U.S.C. (& Supp. IV) 1182(a). That provision simply lists 33 categories of aliens who, in general, are excludable from the United States and ineligible for visas. Nothing in Section 1182 suggests that, merely because an alien is not statutorily excludable or ineligible for a visa, he is therefore entitled to a favorable recommendation by the USIA under Section 1182(e).

171, 176 (3d Cir. 1987) (citing numerous district court cases so holding).[5]

Petitioners (Pet. 18, 23) and AILA (AILA Br. 20) contend that review should be granted because of a purported conflict between the present case and the Third Circuit's decision in *Chong* v. *Director, USIA, supra*. However, while *Chong* contains some conflicting language, the Third Circuit's analysis demonstrates that the claims raised by petitioners would be summarily rejected under the exceedingly narrow scope of review adopted by that circuit. Thus, any possible conflict between *Chong* and the decision below is not fairly presented by the facts of this case.

In *Chong*, the court recognized a "severely limited" scope of judicial review limited to the question "whether the USIA followed its own guidelines"—*i.e.*, whether the agency "determine[d] the policy, program, and foreign relations aspects of a case, weigh[ed] them against the hardship determined by the INS and [made] a favorable recommendation for waiver if the hardship clearly outweighs the other aspects" (821 F.2d at 176 (footnote omitted)). The court then applied that limited standard of review to the USIA's decision at issue, in which an unfavorable recommendation had been made for the following reason: " 'It is not felt the hardship outweighs the intent of Public Law 94-484. The letter that Dr. Chong provided does not con-

[5] In *Silverman* v. *Rogers*, 437 F.2d 102 (1970), cert. denied, 402 U.S. 983 (1971), the First Circuit took jurisdiction to resolve a question of statutory construction and to review an alleged constitutional violation. The court construed a prior version of 8 U.S.C. 1182(e) as giving the Secretary of State (now the USIA Director) a "veto" over hardship waiver applications. While the court reviewed—and rejected—the constitutional claim presented, it did not review the unfavorable recommendation for abuse of discretion. Instead, it ordered that the complaint be dismissed. 437 F.2d at 107.

clusively prove that he will not be able to practice medicine' " (821 F.2d at 177 (quoting USIA decision)). The Third Circuit found the USIA's explanation fully adequate because it "indicate[d] that the USIA 'review[ed] the policy, program, and foreign relations aspects of the case' " (*ibid.* (quoting 22 C.F.R. 514.32)). According to the court, "[t]hat is all that is required by the USIA's regulations" (821 F.2d at 177). The court expressly rejected Chong's argument that a "more particularized" statement of reasons was required (*ibid.*).

In the present case, the reasons given by the USIA for its unfavorable recommendations are essentially the same as the reasons found adequate by the court in *Chong*. And the arguments rejected in *Chong* are basically no different than those raised by petitioner here. Specifically, petitioners contend that the USIA improperly "refused to specify what 'program and policy consuderations' [*sic*] it has relied on in these and in all cases" (Pet. 31). Without such a decision, they argue, "the court and the affected applicants are left in the dark, and the court cannot determine whether an abuse of discretion has occurred" (*ibid.*). Under the analysis adopted in *Chong* (821 F.2d at 176-177), these arguments clearly do not provide a basis for overturning the USIA's unfavorable recommendation.

Moreover, while it is true that the Third Circuit in *Chong* left open some area for judicial review, the D.C. Circuit has done so as well. Thus, the court below recognized that decisions of the USIA are subject to judicial review " '[i]f a colorable claim [is] made of constitutional, statutory, or regulatory violation, or of fraud or lack of jurisdiction on the part of USIA' " (Pet. App. 40 (quoting government's brief)). Accord, *Dina*, 793 F.2d at 476-477; *Abdelhamid*, 774 F.2d at 1450. Since the judicial review recognized by the Third Circuit is limited to

whether the USIA followed its regulations (*Chong*, 821 F.2d at 176-177), and since a claim that the USIA violated its regulations—a claim not made here—is not precluded under the decision below, it is anything but clear whether there is *any* conflict between the present case and *Chong*. But in any event, as noted, there is clearly no conflict with respect to the abuse of discretion claims raised by petitioners here. In short, petitioners would have fared no better in the Third Circuit than in the Second, Ninth, or D.C. Circuits.[6]

2. Petitioners also claim that the USIA "misread the statute and the legislative purpose" in determining that Congress intended that waiver applications by foreign doctors "be dealt with more severely than similar applications by other exchange visitors" (Pet. 29). In fact, however, to the extent that the USIA treats foreign doctors more severely than other exchange visitors, such treatment is fully consistent with Congress's intent.

Section 1182(e) was added to the Immigration and Nationality Act in 1961 (Mutual Educational and Cultural Exchange Act, Pub. L. No. 87-256, § 109(c), 75 Stat. 535). The original statute contained a blanket two-year foreign residence requirement for all exchange visitors, and established the current three-step process for obtaining a waiver. In 1970, Congress liberalized the statute to require

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[6] In claiming an inter-circuit conflict, petitioners (Pet. 23-24) and AILA (AILA Br. 20, 22) also rely on Judge Oakes's concurring opinion in the Second Circuit's *Dina* decision. But that opinion was not adopted by the other judges on the panel, and it is therefore not the law in that circuit. In any event, the scope of review proposed by Judge Oakes, like that in *Chong*, is extremely narrow (see 793 F.2d at 477-478). Judge Oakes rejected the alien's claim—echoed by petitioners here—that the USIA abused its discretion by offering only a conclusory statement that it had balanced the hardship against the program, policy and foreign relations aspects of the case (*ibid.*).

two years of foreign residency only of persons whose participation in the program was financed by the United States or the visitor's home country or those whose home country needed their services (Immigration and Nationality Act Amendments, Pub. L. No. 91-225, § 2, 84 Stat. 116).

In 1976, Congress recognized that there was an increasing influx of immigrant doctors in this country, a majority of whom had entered as postgraduate trainees under the Exchange Visitor Program. That influx concerned many other nations, which were losing a number of their most talented doctors. See H.R. Rep. 94-266, 94th Cong., 1st Sess. 50 (1975). Moreover, Congress determined that by 1976 there was no longer an insufficient number of doctors in this country and, accordingly, that there was no need to give preference to alien physicians (see Health Professions Educational Assistance Act of 1976, Pub. L. No. 94-484, § 2(c), 90 Stat. 2243). Thus, Congress passed legislation imposing substantial restrictions on doctors who entered this country as exchange visitors. For example, the statute requires such doctors to return to their country upon completing their training (8 U.S.C. 1182(j)(1)(C)). And it requires a written statement from the home country, before the medical student enters the country for training, that it needs the skills to be acquired by the visitor (*ibid.*). In 1981, Congress added further restrictive measures applicable to foreign exchange doctors. See, *e.g.*, 8 U.S.C. 1182(j)(1)(E) (foreign exchange doctor must submit, on an annual basis, an affidavit to the Attorney General representing that he will return to his home country upon completion of the training program); 8 U.S.C. 1254(f)(2) (making such doctors ineligible for suspension of deportation). Congress added these provisions in part because of "the flagrant abuse of the exchange program during the

past decade" (H.R. Rep. 97-264, 97th Cong., 1st Sess. 16 (1981)).

As the Third Circuit noted in *Chong*, in both 1976 and 1981, "Congress singled out this group of exchange visitors—physicians—and imposed harsher restrictions on their ability to remain in the United State after they complete their studies than have been imposed on any other group" (821 F.2d at 179 (footnote omitted)). Thus, as the Third Circuit concluded, it is clear that Congress "intended that waivers [to exchange-visitor doctors] not be granted leniently" (*ibid.*). Accord, *Newton* v. *INS*, 736 F.2d 336, 341 (6th Cir. 1984). Petitioners' contrary claim (Pet. 29), which is unsupported by any court decision or statutory provision, does not merit further review.[7]

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[7] Also without merit is petitioners' claim (Pet. 33-34) that their due process rights were violated. To begin with, as the court of appeals recognized (Pet. App. 40), petitioners' complaints did not allege a constitutional violation. The only allegation was that the USIA's actions were "arbitrary, unreasonable, and an abuse of discretion" (see J.A. 12, 31). Petitioners rely on references to due process in their court of appeals briefs (Pet. 33), but they cite nothing to show that a constitutional claim was raised in the district court. In any event, their claim lacks merit. The statute provides no "process" that the USIA must afford a waiver applicant. The USIA receives each case from the INS, makes its own investigation and analysis, and responds directly to the INS. See 22 C.F.R. 514.31(b), 514.32(a) and (b). Neither the statute nor the governing regulations have any provision for a waiver applicant to make any submission directly to the USIA or for the USIA to communicate with the waiver applicant. Nor is there any requirement that the USIA provide a statement of its reasons. Moreover, as explained above, the USIA's decision whether to recommend in favor of a waiver is entirely discretionary; an applicant has no entitlement to a favorable recommendation. For these reasons, there is no merit in petitioners' belated constitutional claims.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NO. 87-894

IN THE

SUPREME COURT OF THE UNITED STATES
October Term, 1987

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AND
MARCO BAQUERO,
Petitioners,

v.

ATTORNEY GENERAL AND DIRECTOR
UNITED STATES INFORMATION AGENCY,
Respondents.

On Writ of Certiorari
to the
United States
Court of Appeals for the
District of Columbia Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

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INTERESTS OF THE AMICUS CURIAE

The American Immigration Lawyers Association is a nonprofit association of lawyers and law professors practicing and teaching immigration, nationality and citizenship law. The Association is supported by the dues paid by its members and is dedicated to the just administration of the immigration laws of the United States. The Association and its members are committed to the development of the jurisprudence of immigration law. The issues raised by this petition for writ of certiorari directly affect many of the Association's members and their clients. The Association, therefore, submits this brief in support of petitioners. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

This Court should exercise its discretion to grant review on writ of certiorari in this case for several reasons. First, the Court of Appeals for the District of Columbia Circuit's decision misapplies this Court's holding in Heckler v. Chaney, 470 US 821, 105 S.Ct 1649, 84 L.Ed. 2d 714 (1985) and conflicts with this Court's landmark decision in Abbott Laboratories v. Gardner, 387 US 136, 87 S.Ct 1507 (1967). The Circuit Court's holding that the United States Information Agency Director's decisions regarding waiver of the two year foreign residency requirement are not subject to judicial review thus raises an issue critical to the field of federal administrative law.

Additionally, the decision of the Court of Appeals for the District of

Columbia Circuit conflicts with this Court's consistent line of desicions insisting on the availability of judicial review of administrative actions except in extremely rare instances where the Government has met the heavy burden of establishing by clear and convincing evidence that Congress intended to preclude judicial review. This conflict results from an unreasonable extension of the presumption of non-reviewabiliy of agency enforcement decisions articulated by this Court in Heckler v. Chaney, supra.

Finally, the decision by the Court of Appeals for the District of Columbia Circuit directly conflicts with the decision in Chong v. Director, United States Information Agency, 821 F.2d 171 (3d Cir. 1987), where the Court of Appeals for the Third Circuit explicitly refused to apply Heckler v. Chaney's presumption

of non-reviewability to the United States Information Agency Director's decisions not to recommend waivers of the two-year foreign residency requirement. Rather, the Court of Appeals for the Third Circuit in Chong applied the traditional strong presumption of reviewability, and, as a result, determined that at a minimum the United States Information Agency's own regulations provided law to apply sufficient to permit judicial review for abuse of discretion.

ARGUMENT

I. Slyper and Baquero's petition for writ of certiorari raises an issue critical to the entire field of federal administrativ law.

The Court below has ruled that decisions by the Director of the United States Information Agency cannot be reviewed for abuse of discretion in the

Courts of the United States. This holding is based on a finding that because the specific statutory section, 8 USC §1182(e), does not provide an explicit list of factors to consider or standards to apply in making decisions to recommend or not recommend waivers of the two-year foreign residency requirement, Congress must have meant to preclude judicial review for abuse of discretion. In fact, the District of Columbia Circuit has found that the mere fact that the statute is drafted so as to vest significant discretion in the Director of the United States Information Agency constitutes "'clear and convincing evidence' of congressional intent to restict judicial review." Slyper v. Attorney General, 827 F.2d 821, 823 (DC Cir. 1987).

By holding that absent "explicit statutory guidelines for the exercise of

discretion", Slyper v. Attorney General, supra. at 823 to 824 (DC Cir. 1987), judicial review pursuant to the Administrative Procedure Act is unavailable, the District of Columbia Circuit appears to reverse the presumption of reviewability and to decline to look beyond the bare words of the statute to find judicially manageable standards. Such an extraordinary holding has far reaching implications for the entire field of federal administrative law. Vast numbers of statutes enabling administrative agencies to act also confer broad discretionary authority on officials enpowered to make a wide variety of decisions. See Hernandez-Cordero v. United States Immigration and Naturalization Service, 819 F.2d 558, 570-574 (5th Cir. 1987) (dissent appending list of statutory sections conferring

broad "in the opinion of" discretionary authority upon the President and other executive officers).

The District of Columbia Circuit, in the decision below has erroneously acted as if the traditional and crucial role of judicial review of agency action were suddenly only appropriate where Congress, by statute has produced an explicit list of factors and standards and specifically directed courts to measure agency action against such a list.

It must be noted that even where broad discretion is vested in an agency, as in the statutory sections referred to above, a challenge to the legal precepts and procedures used by that agency always merits review. In fact, judicial review in such circumstances is essential. As

Professor Kenneth C. Davis has noted,

> a check for abuse of discretion is entirely appropriate where discretion is broad..., because the administrator may be abusing his discretion by violating the statute, by emphasizing facts on one side and ignoring opposing facts, by reacting to emotional and irrelevant considerations, or by otherwise acting unreasonably.

K. Davis 5 Adminstrative Law Treatise, §28:7 at 289 (2d Ed. 1984). Similarly, in a concurring opinion to this Court's decision in Heckler v. Chaney, supra, Justice Marshall stated,

> judicial review is available under the Administrative Procedure Act in the absence of a clear and convincing demonstration that Congress intended to preclude it precisely so that agencies, whether in rule making, adjudicating, acting or failing to act, do not become stagnant back waters of caprice and lawlessness. Heckler v. Chaney, 470 US at 848.

By allowing the opinion of the Court of Appeals for the District of Columbia Circuit to stand unreviewed, this Court would send a chilling message to other courts in the federal system that the long standing presumption of reviewability of administrative action can now be overcome by a mere showing that Congress neglected to make express the factors to be considered and weighed in making certain administrative decisions. Thus, the far reaching and damaging impact of the decision below merits a grant of review on certiorari by this Court.

II. The District of Columbia Circuit's opinion below conflicts with both long standing and recent decisions of this Court regarding the strong presumption of judical review and inappropriatley extends the application of

the holding of this Court in Heckler v. Chaney.

The starting point for any inquiry into the reviewability of adminstrative action must be the strong presumption favoring judicial review that has been repeatedly asserted by this Court. See Abbott Laboratories v. Gardner, 387 US 136, 141, 87 S.Ct 1507, 1511 (1967). This strong presumption was reaffirmed by this Court's seminal opinion in Citizens to Preserve Overton Park v. Volpe, 401 US 402, 91 S.Ct 814 (1971).

Most recently in Bowen v. Michigan Academy of Family Physicians, 476 US __, 106 S.Ct __, 90 L.Ed. 2d 623 (1986), this Court not only reasserted the strong presumption of judicial review of administrative action, but also provided a thoughtful and comprehensive explanation of the importance of this doctrine to

American society. Id. at 90 L.Ed. 2d. 628, 629 (reviewing not only judicial authority for the presumption of reviewability, but also legislative history of the Administrative Procedure Act and the writings of various scholarly commentators). Significantly, this Court commented that the requirement of a showing of clear and convincing evidence that Congress meant to preclude review is a "standard that serves as 'a useful reminder to courts that, where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling.'" Id. at 629 n3. (quoting Block v. Community Nutrition Institute, 487 US 340, 351 (1984)).

This Court has repeatedly acknowledged the essential role that the judiciary must play in protecting

individuals from agency arbitrariness. Broad grants of discretionary authority alone cannot, under the case law established by this Court, justify finding that agency action is unreviewable. As this Court noted in Bowen v. Michigan Academy of Family Physicians, supra at 629, in order to find that a decision is "committed to agency discretion by law" pursuant to 5 USC §701(a)(2) the inference that Congress intended to preclude abuse of discretion review should be inescapable; there should be no doubt or credible argument to the contrary. In fact, this Court has itself implicitly rejected the argument that the mere presence of broad discretion warrants a finding that judicial review for abuse of discretion is available. INS v. Rios-Pineda, __US__, 105 S.Ct. 2098 (1985) (finding reviewable a discretionary denial

of a motion to reopen deportation proceedings and in so doing, rejecting government's express claim of non-reviewability).

The District of Columbia Circuit's departure from this Court's longstanding insistence on a strong presumption of reviewability seems to be a result of its unwarranted extension of the presumption of unreviewability articulated in this Court's decision in Heckler v. Chaney, supra in the very limited context of agency enforcement decisions.

Both the holding itself and the analysis conducted by this Court in Heckler v. Chaney, by its own terms must be limited to agency decisions not to take enforcement action. First of all, this Court expressly and narrowly created an exception to the traditional strong presumption of reviewability required by

the Overton Park decision. This exception was justified in part by the following language:

> Overton Park did not involve an agency's refusal to take requested enforcement action... this Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce... is a matter generally commited to an agency's absolute discretion. [citations omitted]. Heckler v. Chaney, 470 US at 831.

Additionally, this court cited many factors- that may render agency decisions not to take enforcement action unsuited to judicial review but which simply do not apply to the type of primarily adjudicatory agency action at issue in the instant case. More specifically, this Court noted that agency decisions not to take enforcement action often involve "complicated balancing of a

number of factors which are peculiarly within its expertise", 470 US 821 at 831, such as allocation of resources, availabilty of adequate resources, and likelihood of meaningful and successful results. Moreover, this Court noted a critical practical distinction between agency action such as that in the instant case and an agency decision not to take enforcement action:

> ...When an agency refuses to act it generally does not exercise its coercive power over an individual's liberty or property rights, and thus does not infringe on areas that courts are often called upon to protect. Id. at p. 832

Certainly, if the director of the United States Information Agency arbitrarily and capriciously refuses to recommend waivers of the two-year foreign residence

requirement, thereby inflicting predetermined exceptional hardship on United States citizen or permanent resident spouses and children, such action does constitute an exercise of coercive adjudicatory power of the sort that courts are particularly well suited to review.

Despite this Court's effort to limit the scope of its holding in Heckler v. Chaney and to explicitly articulate the narrow issue that decision confronted and decided, Id. at 823, 828, the District of Columbia Circuit has latched onto a single, purely explanatory sentence in this courts Chaney decision and from that has essentially lifted the long standing burden on the Government to show by clear and convincing evidence that Congress meant to preclude judicial review. The finding of no law to apply does not comport with the requirement implicit in

the statute that the Director of the United States Information Agency not act arbitrarily; but rather that he balance the policies of the exchange visitor program against the hardship found by the Immigration Service. As the statutory scheme at 8 USC §1182(e) makes clear, the Director of the United States Information Agency is not even called upon to make a recommendation unless a finding of hardship has first been made. If the USIA director were thus authorized to act as arbitrarily and capriciously as he pleased, the requirement that the Immigration Service make a hardship determination would be superfluous. The only reasonable inference to be drawn from this particular statutory scheme is not that Congress meant to withhold review; but rather, that Congress has implicitly required the United States Information

Agency to balance hardship against such factors as program objectives and to do so in a reasonable, non-arbitrary manner. The United States Information Agency by its own regulations located at 22 CFR §513.32 make these implied guidelines explicit. These factors, hardship to United States citizen relatives and exchange program objectives, can be reviewed by courts for abuse of discretion without reaching beyond the bounds of judicially manageable standards as might possibly be required when a court is determining whether enforcement action ought to have been taken.

This Court in Overton Park made clear that review of an agency decision encompasses review of its ultimate judgment. The scope of this review may be narrow, but courts nevertheless have a responsibility under the Administrative

Procedure Act to determine whether the agency has made a "clear error of judgment". Overton Park, 401 US at 416. Such a determination regarding ultimate judgment can be made without Congress necessarily providing a list of specific factors to consider. Moreover, the District of Columbia Circuit's refusal to recognize that the structure of 8 USC §1182(e) itself provides implicit law to apply in reviewing for abuse of discretion can find no support in a fair reading of this Court's decision in Heckler v. Chaney. The Court in Chaney addressed the tension between 5 USC §701(a)(2) and the broad judicial review provisions of 5 USC §706 and determined that courts generally have no meaningful standard against which to measure agency decisions not to act.

III. Conflict Among the Circuits

The District of Columbia Circuit's decision stands in stark contrast to the decision rendered by the Third Circuit in Chong v. United States Information Agency, supra. Both courts confronted the application of this Court's decision in Heckler v. Chaney to the issue of reviewabilty of USIA decisions not to recommend waivers of the two-year foreign residency requirement. Similarly, a three judge panel of the Second Circuit in Dina v. Attorney General, 793 F.2d 473 (2d Cir. 1986) split two to one over the issue of applying Heckler v. Chaney's reasoning to the issue of reviewability of USIA decisions. In fact, the Third Circuit explicitly notes Judge Oakes' concurring opinion in Dina. Chong v. Director USIA, 821 F.2d. 171, 175 n.3 (agreeing with Judge Oakes that "Heckler v. Chaney does not stand for the proposition that §701(a)(2) precludes judicial review in a

large number of cases. [citations omitted]. Moreover, we believe that Chaney did not change the presumption of reviewability of agency action under the APA. [citations omitted]"). Thus, after carefully analyzing Heckler v. Chaney, supra, in the context of Overton Park, supra, and Abbott Laboratories, supra, the Third Circuit took the correct position that, given the continued vitality of the strong presumption of reviewability of agency action, there must, without any question or doubt, be absolutely no judicially manageable standards against which a court may judge whether or not discretion has been abused.

Under this standard, which comports with the long line of cases of this Court insisting on a strong presumption of reviewability, the Third Circuit found sufficient guidance in the

regulations promulgated by the United States Information Agency itself. These regulations, located at 22 CFR §513.32, instruct the Director of the United States Information Agency to review the policy, program and foreign relations aspects of each case before transmitting a recommendation. The USIA director must consider these factors and balance them against the Immigration Service's finding of extreme hardship to United States citizen or permanent resident children and spouses.

The Third Circuit as well as Judge Oakes in his concurrence in Dina found that the statute and regulations, though broadly drawn, provide sufficient guidance for courts to determine whether a given decision was made in a non-arbitrary and reasoned manner.

The District of Columbia Circuit

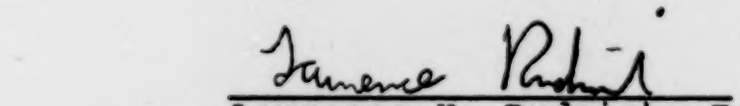
and the majority of the Second Circuit panel have disagreed finding that neither the statute nor the regulations provide sufficient law to apply. Moreover, both courts have found the perceived lack of "law to apply" sufficient to meet the Government's burden of showing by clear and convincing evidence that the Congress meant to preclude judicial review of USIA determinations regarding waivers of the two-year foreign residency requirement.

This condition is an unwarranted limitation of the role of the Courts in the administrative process. The institutional balance reached in Abbott, Overton Park, and Heckler, assigns to the Courts a limited, but real role in reviewing agency action. The decision of the District of Columbia Circuit disturbs that balance in a way which grants unlimited discretion to the USIA and constitutes an improper abdication of judicial responsibility.

CONCLUSION

For the above stated reasons, and pursuant to the guidance provided by this Court's Rule 17.1, this Court should grant review of petitioner's Writ of Certiorari and, upon further briefing, as required, reverse the decision of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,



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SUPREME COURT OF THE UNITED STATES

ARNOLD H. SLYPER ET AL. *v.* EDWIN MEESE, III, ATTORNEY GENERAL, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 87-894. Decided March 7, 1988

The petition for a writ of certiorari is denied.

JUSTICE WHITE, dissenting.

This case presents the issue whether the United States Information Agency's (USIA's) decision to recommend against waiver of the requirement that a foreign doctor in this country for graduate medical training return to his or her foreign residence for two years prior to applying for permanent residence status here is subject to judicial review for abuse of discretion. See 8 U. S. C. § 1182(e) (1982 ed., Supp. IV). A waiver from the two-year foreign residence requirement can be obtained on "hardship" grounds, one condition for which is that the Director of the USIA make a favorable recommendation concerning the waiver. The Court of Appeals held that because neither the relevant statute nor implementing regulation provided a standard against which to assess the Director's exercise of discretion, the decision was one committed to the agency's discretion by law and accordingly not reviewable under the Administrative Procedure Act, 5 U. S. C. § 701(a)(2). 827 F. 2d 821, 823-824 (CADC 1987). In so holding, the court reached the same conclusion as the Second and Ninth Circuits, *Dina* v. *Attorney General*, 793 F. 2d 473, 476 (CA2 1986) *(per curiam)*; *Abdelhamid* v. *Ilchert*, 774 F. 2d 1447, 1449-1450 (CA9 1985), and rejected the contrary conclusion of the Third Circuit, *Chong* v. *Director, USIA*, 821 F. 2d 171, 176 (1987). I would grant certiorari to resolve the conflict amongst the Circuits over this question of federal law.